

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 455 OF 2006

ARBITRATION PETITION NO. 93 OF 2006

ARBITRATION PETITION NO. 311 OF 2007

SushilKumar Gupta Petitioner.
Versus
VinodKumar Gupta & Ors. . . .Respondents.

Mr. Arif Bookwala, Sr.Adv. with Ashwin Ankhad i/by.
Ashwin Ankhad Adv. for the petitioner in Arb.Petn
No.93 of 2007 and Arb.Petn No.455 of 2006.
Mr.Rohit Kapadia, Sr.Adv. with Mr.P.N. Mody and Riyaz
Chhagla i/by. Thakordas and Madgaonkar for respondent
nos.1 to 4.
Mr.N.C.Dalal for respondent no.5.
Mr.S.J. Purohit for respondent no.10.
Mr.Sanskar Marathe for respondent no.9.

CORAM: S.C.DHARMADHIKARI, J.

DATED: 20TH DECEMBER, 2007.

JUDGMENT :

1. This Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award made by the Learned Sole Arbitrator on 24.4.2006. The Award is rendered in a dispute between the Petitioner and First Respondent who are the real brothers. The rest of the Respondents are their mother and sisters, the private limited companies and firms, which are closely family held units. Thus, the dispute

is between the family members and the Award purports to put an end to them.

2. Mahavir Prasad Gupta, father of the Petitioner and Respondent No.1 was a self made man. The said Mahavir Prasad came to Bombay and set up various business. He was a self made man who shifted from a small place in the state of Haryana to Mumbai in 1950. Initially he started working as an employee with his cousins and thereafter established extensive business of his own. Subsequently his two brothers B.P. Gupta and Kishen Chand Gupta joined him. They carried out the business jointly for some time. Mahavir Prasad married Shantidevi in 1946. He had two sons and two daughters from this marriage. Petitioner and Respondent Nos. 1 are the sons and Respondents Nos.10 and 11 are the daughters. Their mother Shantidevi is Respondent No.5. The daughters are married. Petitioner married Anjana (Respondent No.6) and they have three children. The First Respondent married Respondent no.2 and they have two sons. The Petitioner joined the father's business in 1975 followed by First Respondent who joined in 1977.

3. In 1986, Mahavir Prasad and his two brothers entered into an arrangement whereby the share of Mahavir Prasad was determined as 45% and that of his two brothers at 30% and 25%. The arrangement between them need not be referred to in detail. In 1976 Mahavir Prasad's health started deteriorating. He noticed that his two sons Sushil and Vinod (hereinafter referred to as 'SKG' and 'VKG') had several differences. Mahavir Prasad appointed his younger brother Kishen Chand Gupta to suggest distribution of properties. The properties of Mahavir Prasad at the relevant time included residential premises at Laxmi Vilas, NapeanSea Road and a Bungalow at Shakti Nagar, New Delhi. The commercial premises included Office at Mittal Towers, Nariman Point and a plot of land at Bhandup, Warehouse at Sitaram Mills Compound, and also a warehouse at Byculla, Land/Godown at Vadgadi, Land at Karamboli and other places. They had several business interests after the sons joined the father.

4. Due to the differences between SKG and VKG the business activities were adversely affected. In such

circumstances, it was decided to commence the process of distribution and a valuation was carried out as on 23.2.1997. It is contended that as per the wishes of Mahavir Prasad Gupta, SKG would have 51% of the Assets while VKG would have 49% It appears that SKG claimed one percent more on the footing that he joined the business two years prior to VKG. It is not necessary to make any detailed reference to the attempts made by the uncle and other close relatives to put an end to the differences between SKG and VKG. However, it is of some relevance to note that on 24.4.1997 the document styled as "Award" was made by Mahavir Prasad Gupta. He subsequently expired on 27.7.1997. The said Mahavir Prasad would now be referred to as 'the father'.

5. The document prepared by the father is dated 24.4.1997 and reads thus :

"I Mahabir Prasad Gupta hereby award to my sons Sushil K. Gupta and Vinod K. Gupta as follows :-

The following distribution/division of fixed asset were made and accepted.

PROPERTIES :-

Sushil Gupta

51% share Bhandup

Vinod Gupta

49% share Bhandup Land

51% loans	49% of loans
51% of All Receivables	49% of all receivables
Flat at Sumangal	Flat at Laxmi Vilas
Unit # 161 Mittal	Unit # 162 Mittal
Land at Mulund	SVA Ltd.
2 flats at Raag	Mangla Capital
Godown at Byculla	Vadgadi
Manish	Kalamboli
Ragnigandha	Badli
Panvel	Mazgaon
Gurgaon Shops	
Radhepuri	
Diamond	
Ghusari	
51% of Ery Sterate	49% of Ery Sterate
51% of cylinder stocks	49% of Cylinder stocks
51% of Chlro base stocks	49% of Chlro base stocks
51% of POY and HCL thoyo	49% of POY and HCL thoyo
goods and stocks 112 lacs per annexure 1	Goods and stocks 39.35 lacs per annexure 1

VKG to pay SKG 13 lacs by 15 June 1997 and the balance of 15.3 lacs by 15 July 1997 without demur in default VKG will pay 2 percent p.m.

6. It is material to note that the father kept some properties to himself. However, he died without leaving a will.

7. Upon death of the father the disputes between the two brothers increased and this time they fought over implementation of the arrangement which has been made by the father. Although the relatives were requested to intervene in the disputes and differences between the two brothers they withdrew from the reference. The parties were executed a reference on 18.11.2000 and nominated Mr. Justice M.L.Pendse, Retired Chief Justice of Karanataka High Court and a Learned Judge of this Court as sole Arbitrator. Initially the brothers were represented by Advocates but later on they appeared in person. The sole Arbitrator has extensively referred to the attempts made by him to resolve the disputes amicably. During the course of the reference, these attempts did not yield the desired results and therefore the points for determination were settled on 1.2.2002. A notice

was given to the sisters and it appears that the two brothers took a reasonable stand and insofar as the claim of the sisters and mother was concerned they were put an end to. Sister Pushpa Aarya Gupta stated in writing that she is giving up her claim in the estate of the father. The Memorandum of Understanding was executed between the parties by which the claims of the mother and other sisters were settled. This MOU is enclosed and marked as Annexure 1 to the Award.

8. Thereafter, oral evidence was recorded of the witness examined by VKG. The old mother's claim was also settled during the course of recording the evidence. The claims of the mother have been put an end by a Deed of Settlement dated March 4, 2000. An Interim Award was made in terms of this Deed of Settlement on 9.6.2004 (Annexure-2) to the Award. The mother was given the property at Shakti Nagar, Flat in Phoenix Building, Mumbai and two Flats in Vrindavan Building, Malad as her exclusive and absolute property. In addition a sum of Rs.5 crores were to be paid to the mother from the estate of the father. The Memorandum of Settlement between the mother and the others has

been countersigned by SKG and VKG. The mother gave up her right, title and interest in the properties which are more particularly described in the terms of Settlement.

9. The Award proceeds on the basis that VKG asserted that the father's Award is final and he is entitled to whatever has been awarded to him under that document. He further claimed that MPG's estate should be distributed equally between SKG and VKG. He further claimed that the liabilities which were not listed in the Award should be shared equally by the two brothers. The Award proceeds to state that SKG's claims are that the MPG's estate should go to Shantidevi and the Award of the father did not specify the list of Assets and Liabilities. Even the mother Shantidevi stated that the Award is not valid and binding on any of the partners. She stated that the estate of MPG should be distributed in accordance with Section 14 of the Hindu Succession Act. It is not necessary to refer to these aspects when independent settlement has been arrived at between himself and the sisters.

10. In the Award in Para 8 this is what is stated by the Learned sole Arbitrator.

"8. In large number of meetings held with Sushil and Vinod, it was suggested that as both of them are not disputing the disbursement made by the 'Award', it would be in the interest of both the brothers to work out the directions in the 'Award' in respect of immovable property. Both the brothers took a very practical view and agreed to implement the directions given in the 'Award' in respect of the immovable property."

11. From paragraphs 9 to 21, the Learned sole Arbitrator refers to the several properties which would go to the share of the respective brothers and in paragraph 22 he refers to the suggestion given to the brothers to approach a Chartered Accountant who shall submit a report with regard to the Shares and Receivables, Stock Lists and Liabilities. Both partners agreed to this course of action but differed on the name of the C.A. On 15.3.2005, M/s. Haribhakti and Co. C.A. were appointed by the Learned sole Arbitrator with the following directions.

". Ultimately I suggested that the Parties should approach the Chartered Accountant and before whom the issue as regards shares and receivables, stocks lists and liabilities with reference to accounts and incidental documents should be raised. Sushil and Vinod agreed to

the suggestion but could not agree to the name of the Chartered Accountant and ultimately on March 15, 2005 Messers Haribhakti and Company, well known Chartered Accountants were appointed with the following directions.

(a) Both the parties should file their claim in respect of the amounts before the Chartered Accountants on or before July 11, 2005 and furnish copy to the other side.

(b) Both the parties to file Reply on or before July 5, 2005.

(c) The Chartered Accountants to hear the Parties on July 21, 22 and 23, 2005. If required, the Chartered Accountants to seek further documents prior to hearing the parties.

(d) The Chartered Accountants to make report before August 13, 2005 in writing.

The Chartered Accountants were requested to take accounts for two accounting periods namely (1) September 1, 1996 to May 31, 1997 and (b) From June 1st 1997 to end of July 2005. The accounts were to be determined in respect of following:

- (i) Stocks.
- (ii) Entry.
- (iii) Loans and advances.
- (iv) Shares.
- (v) Bank balances.
- (vi) Liabilities prior to May 1997.
- (vii) Assets.
- (viii) All accounts.

12. The Learned sole Arbitrator refers to the directions given to the parties with regard to production of material before the C.A. The direction issued was that the C.A. shall proceed to make a report on the basis of the material produced by either of the parties. The C.A. may examine the material and seek an explanation. Even if the parties fail to appear, and within the stipulated time the report of the C.A. must be submitted.

13. Accordingly parties appeared before the C.A. and they submitted a report on 27.8.2005.

14. On the basis of this report and various documents which were produced and oral submissions made, the Learned sole Arbitrator made the following Award.

15. Since the Award is challenged by SKG to the extent of the properties which were in dispute with VKG, it would be convenient to refer to only what has been referred to in depth.

SUSHIL KUMAR GUPTA :

(L) Sushil Kumar is entitled to Bhandup property after handing over the area of 7594 sq.meters to Vinod Gupta. The area of 7594 sq.meters will include CTS No.782.

(M) The Flat at Sumangla is allotted to the share of Sushil. As and when the stamp duty is required to be paid in respect of this flat, Vinod should reimburse the amount only to the extent of 49%.

(N) Unit No.161 in Mahindra Towers, Mumbai, is exclusively allotted to the share of Sushil.

(O) The godown at Byculla is tenanted in the name of Gourisons and which has been exclusively allotted to Sushil. The rights in this property belong to Sushil.

(P) The property bearing CTS No.551/76 at Mulund is allotted exclusively to Sushil. The property is standing in the name of Shantidevi, Vimla Devi and Asharani. Shantidevi should execute proper documents in favour of Sushil and Sushil to secure proper documents from Vimla Devi and Asharani.

(Q) The unit in Manish Commercial Centre is allotted to Sushil and the documents in respect of this property are already handed over to Sushil.

(R) Two flats in Rajnigandha, Gokuldharm at Goregaon are allotted to the share of Sushil. The documents in respect of the share transfers, bills, possession and keys are already handed over to Sushil by Vinod.

(S) Two flats at the building Raag at Film City, Goregaon are allotted to Sushil. The agreement of sale in respect of these flats was handed over by Vinod to Sushil along with assignment of documents by Vinod and Ranjana in

favour of Sushil.

(T) The area covered by Portion I marked on Annexure 9 in respect of Sitaram Mills Compound is allotted to share of Sushil and to be divided by partition wall.

(U) The land at Ghusari, Howrah, has been exclusively allotted to Sushil and Vinod has signed a letter of disclaimer in respect of this property.

(V) Sushil is entitled to the Diamond as mentioned in the division made by Mahavir and Vinod shall handover that diamond to Sushil and in case of failure Vinod shall pay Rs.35 lakhs to Sushil.

(W) Vinod shall pay Rs.7/- Lakhs (Rupees Seven Lakhs) to Sushil in respect of Gurgaon shops which are allotted to the shares of Sushil. In addition Vinod is liable to handover vacant and peaceful possession of these shops to Sushil.

(X) Vinod shall pay to Sushil the following three amounts.

(1) Rs.85,64,931/- (Rupees Eighty Five Lakhs Sixty Four Thousand nine hundred thirty one only) out of the amounts received by Vinod.

(2) Rs. 5,80,000/- (Rs.Five lakhs Eighty Thousand only) being the balance amount awarded during division by Mahavir Prasad.

(3) Rs.7/- Lakhs (Rupees Seven Lakhs only) as hereinabove mentioned in respect of Gurgaon shops.

(4) Vinod shall pay the amounts along with interest at the rate of 24% per annum from November 18, 2000 till the date of Award in present Reference and thereafter at the rate of 9% per annum till the date of realisation.

VINOD KUMAR GUPTA :

(Z) Flat at Laxmi Vilas Building is exclusively allotted to Vinod. All papers in respect of this flat including the letter of disclaimer signed by Sushil are already handed over to Vinod. In case any stamp duty is required to be paid in respect of purchase of this Flat, then Sushil shall contribute 51% of the said duty and make payment to Vinod. Sushil will issue necessary letters in respect of this flat in case pending before the Income Tax Authorities.

(AA) Unit No.162 in Mittal Towers is allotted to Vinod exclusively. Shantidevi shall transfer her interest in the Unit in favour of Ranjana, wife of Vinod.

(BB) The plot of land at Kalamboli is allotted to Vinod exclusively. Shantidevi shall transfer her share in the plot in favour of Ranjana as desired by Vinod.

(CC) The area covered by portion II as marked on Annexure 9 in respect of Sitaram Mills property is allotted to the share of Vinod and the same should be divided with portion I allotted to Sushil by putting the boundary wall. The expenses for putting up the boundary wall shall be borne equally by both the brothers.

(DD) In respect of monetary claims, arising out of loans, stocks, entry, shares, bank balances etc. Sushil shall pay to Vinod the following amounts.

(1) Rs.3,51,31,642/- (Rs.Three crores fifty One lakhs thirty one thousand six hundred forty two only) towards half share in the rent received from Mid Day.

(2) Rs.1,82,50,000/- (Rupees One crore Eight Two Lakhs fifty Thousand Only) as share arising out the sale proceeds of Embassy flat.

(3) Rs.2,86,340/- (Rs.Two lakhs eighty six thousand three hundred and forty only) being half share in opening Bank Balance.

(4) Rs.2,50,000/- (Rs.Two Lakhs fifty thousand only) as HALF share in respect of payments made towards sales tax.

(5) Sushil shall pay interest on the abovementioned amounts at the rate of 24% from November 18, 2000 till the date of Award in present Reference and thereafter at the rate of 9% per annum till the date of realization.

39. Before parting with the reasons it must be observed that though several attempts were made to sort out the differences and disputes between the brothers the attempts failed. Though the brothers settled with their two sisters and the mother, it was impossible to put an end to the family disputes as the relations were extremely strained. Let this Award put an end to the family quarrels and let the two brothers who are very efficient in their vocations proceed separately and be happy.

40. In the circumstances, each party to bear their respective costs."

16. It is this Award which is subject matter of challenge. Subsequently parties appeared before the sole Arbitrator who gave certain clarifications on

26.7.2006. That direction is on application made by VKG under Section 33 of the Act on 24.5.2006. Even SKG filed an application on 17.7.2006. By a common order on these applications, the sole Arbitrator issued corrections thereby correcting the typographical errors and disposed off both the applications accordingly by rejecting rest of the prayers.

17. It is this exercise which is subject matter of challenge in the present petition.

18. Mr.Bookwala, Learned Senior Counsel appearing for SKG in support of the Arbitration Petition, submits that, the dispute now is in regard to the following :

(a) Rent received in respect of the premises at Sitaram Mills Compound.

(b) Consideration received in respect of Embassy Apartment flat.

(c) Delivery of diamond.

(d) Shops at Gurgaon in the state of Haryana.

(e) Receivables.

(f) Property at Tikri and the objections to the report of the C.A.

19. During the course of the submissions in rejoinder, Mr.Bookwala also referred to the rent which is recoverable in respect of the Bungalow at Shakti Nagar, New Delhi (50%).

20. The main objection of Mr.Bookwala is that the Award does not put an end to the dispute between the parties at all. The Award is a narration of the disputes and events leading to the same. The Award makes no reference to the pleadings, evidence, points for determination and oral submissions at all. It is the most unusual way of resolving a dispute by arbitration in as much as the Arbitrator is expected to render a decision one way or the other. The Arbitrator cannot put his own version on the dispute referred, adverting to the rival contentions. He submits that

the Award made in this manner can never be upheld. He submits that the fundamental aspect for resolving disputes in Arbitration, is that the Arbitrator has to be fair and just. His approach must be such as could be termed fair, just and proper. The Arbitrator may seek assistance of a Chartered Accountant in disputes on accounting matters but he is not expected to abdicate his essential function. Mr.Bookwala criticises the said Award as being unreasonable, unfair and unjust. He submits that the Arbitrator does touch the core issues and try to resolve them at all. In other words, he faults the approach petitioner and submits that the Arbitrator has rendered an Award against him and in favour of VKG. Mr.Bookwala, submits that with regard to the lease and the rent receivable in respect of Sitaram Mills premises, there is hardly any discussion with regard to the rival versions. The Arbitrator could not have issued a direction which does not serve any purpose. Mr.Bookwala, points out, that in so far as the loans and receivables are concerned, no directions are issued. What the Arbitrator has in mind is that SKG must resort to litigation and recover monies due to him. If the claims that are going to the

share of SKG concerned, are no longer receivable, then, any direction in regard to the loans and receivables are futile and meaningless. Mr.Bookwala, submits that, in any event, no documents were produced with regard to the loans and receivables. Just a paper direction has been issued. The Learned Arbitrator should have kept the father's wishes in mind and issued appropriate directions to recover the loans and receivables in proportion, to the heirs of the brothers. If VKG is to recover some amounts, then he should be directed to do so and hand them over to SKG. If there is a shortfall, then, that also must be made good. Nothing of this has been done and therefore this Award is wholly vitiated. With regard to the Embassy Flat, Mr.Bookwala's submission is that the directions issued are wholly erroneous.

21. He submits that the petition clearly sets out as to why the Award on this count is contrary to the fathers wishes and the basic facts. The report of the C.A. which is accepted by the Arbitrator shows that a sum of Rs.1,13,25,500/- was used for repayment of loans and interest taken from Vijaya Bank for purchasing

these premises. No credit has been given by the Arbitrator to the Petitioner in respect of this sum. This sum has to be deducted from either, sums which are payable to VKG or from the sale proceeds of the flat in Embassy Apartments. While Respondent No.1 has been awarded his one-half share in the sale proceeds of this flat, no credit has been given to the Petitioner for discharging the liabilities incurred towards purchasing this flat. Thus there is a patent error committed by the Arbitrator. Mr.Bookwala has pointed out that the Respondent No.1 vide his statement dated 4.8.2005 submitted to the C.A. has given credit to the Petitioner of Rs.1,48,52,500/-. The C.A.'s have voluntarily reduced the said amount to Rs.1,13,21,500/-. This shows total non application of mind and gross inefficiency. Even the C.A. has taken the sale value on an assumed basis. The sale proceeds were utilised to pay loans, meeting miscellaneous expenses, legal expenses, society maintenance charges, repairs, brokerage on purchase and sale etc. The balance amount was adjusted by the Income-Tax department towards tax liability of the father. It is urged that the statement in this behalf was before the C.A. and the

Learned Arbitrator but the same has not been considered by either of them. He has invited my attention to the operative part of this Award in so far as this aspect is concerned and contended that even if there is no dispute that the flat was sold and the amount received was Rs.47 lakhs and the appropriation and adjustment as sought by VKG have not been accepted, yet, the observations in the Award at pages 96 and 101 and the ultimate direction are contrary to each other. In such circumstances, the conclusion drawn by the Arbitrator with regard to the payment made is contrary to the terms of reference. Therefore, the Award be set aside. Mr.Bookwala has also invited my attention to Annexure 3 to the Award and has submitted that the entire working by the C.A. could not have been accepted without any scrutiny by the Arbitrator.

22. Mr.Bookwala has also contended that the objections to the C.A.'s report by SKG are very much on record. They have been ignored by the Arbitrator. Mr.Bookwala was at pains to point out that even with regard to the Diamond which is valued by SKG at Rs.1 crore, the directions by the sole Arbitrator are not

clear. The Arbitrator has very clearly held that SKG is entitled to the Diamond and VKG was to hand over the same to SKG. However, in case of failure, VKG shall pay Rs.35 lakhs to SKG is a conclusion insupportable by any material. The Learned Arbitrator ought to have satisfied himself with regard to the availability of the diamond. If it is available with VKG, then, there is no question of any valuation, much less, at a figure which is nominal and meagre. The Award is therefore vitiated on this count also.

23. Mr.Bookwala, then, criticizes the Award with regard to the shops at Gurgaon. Mr.Bookwala, submits that, the Award directs that in so far as the seven shops at Gurgaon are concerned, they were allotted to the share of SKG. However, the Arbitrator directs that SKG is entitled to Rs.7 lakhs in respect of these shops which are allotted to his share. In addition, VKG is liable to hand over vacant and peaceful possession of these shops to SKG. Mr.Bookwala, submits that, in so far as these shops are concerned, the Arbitrator should have ascertained the factual aspects. He submits that all the seven shops are sold. He relies upon an

Agreement dated 30.11.2001. He submits that the Learned Arbitrator was aware of this position, in as much as, the objections have been filed before him so also the written arguments. He submits that the Gurgaon shops were sought to be sold by VKG without any authority from SKG. If VKG claims to have entered into an agreement and has received some sums/amount so also urged that he has entered into an agreement to save the shop from encroachers, then, when this argument and case was rejected by the Arbitrator, he should have ensured that the shops are placed in physical possession of SKG or their market value be determined and VKG be directed to pay appropriate sums accordingly. Mr.Bookwala, submits that the direction results in unfair treatment to SKG because he does not get physical possession of the shops nor does he get the market value of the same. Merely handing over paper possession or title to SKG would not be just and proper. The Award is therefore grossly unfair and unjust and therefore contrary to public policy.

24. Mr.Bookwala, then criticizes the Award, in so far as the land at Tikri is concerned as well. He

invites my attention to Ground (BB) in the petition and urges that the Tikri land should be taken to be a valuable property/asset. The property is personally managed by VKG. The Arbitrator has discussed about this property in paragraph 17 of his Award but has completely omitted to pass any directions with regard to the same in the operative portion. He therefore unjustly enriches VKG in so far as this property is concerned and at the same time deprives the Petitioner of his rightful one-half share therein. He submits that if VKG is in possession of this land and the Award made by the father is silent about the same but a claim was specifically raised by SKG before the sole Arbitrator, then, it was incumbent upon the Arbitrator to have issued appropriate directions with regard to the Tikri land.

25. Mr.Bookwala has referred to the father's Award, insofar as the Receivables are concerned. However, he submits that there is no reference to the same in the C.A.'s report. The Learned Arbitrator also does not give any reason. Thus, no interest to SKG is awarded although the father says that such interest be awarded.

Except observing that the claim is time barred, the sole Arbitrator does not give any directions. He has submitted that the contentions of the petitioner with regard to the Receivables are concerned have been erroneously rejected in paras 35 and 36 of the Award. He submits that whatever directions have been issued with regard to the distribution of his receivable by the father cannot be rendered futile and meaningless by the sole Arbitrator. He submits that the sole Arbitrator has termed the demand as time barred. In such circumstances, the Award with regard to the receivables deserves to be quashed and set aside. He has invited my attention to paragraph 24 (running page no.93) of the Award and has urged that the finding therein that there is no clear evidence that the loans were received or otherwise is contrary to the documents and materials placed on record. Therefore, no directions are given in regard to the loans and receivables which is defeating the principle of equitable and complete distribution of the estate.

26. Mr.Bookwala has also referred to the reply filed to the petition and more particularly para

63(page 27) thereto. He submits that VKG has also raised issue about Sitaram Mills Compound and Embassy Flat. The same have not been gone to the share of VKG yet he raised issue with regard to the same. Mr.Bookwala submits that the clarificatory Award has lost sight of this aspect completely and in such circumstances this is a fit case where this court should exercise its power under Section 34 and set aside the award.

27. Lastly Mr.Bookwala urges that even if the Award is bad with regard to some claims and disputes, yet, the entire award will have to be set aside and in this behalf he has placed reliance upon Section 34 of the Arbitration and Conciliation Act, 1996 and Para 52 of the Decision reported in **Mcdermott International Inc. V/s. Burn Standard Co.Ltd and Ors (2006) 11 SCC page 181**

28. On the other hand Mr.Kapadia, Learned Senior Counsel appearing for respondent no.1 VKG submits that the Award is not liable to be interfered at all. He submits that no case is made out for setting aside the

Award. He submit that all grounds in the petitioner are in the nature of calling upon the court to reappreciate and reappraise the materials which are relied upon by the sole Arbitrator. He submits that the Award has been rendered after the Sole Arbitrator decided to seek the assistance of the C.A. by consent of parties. Nobody including the petitioner objected to the same. The choice of the C.A. was also left to the sole arbitrator. Then, there can be no objection about the procedure which is to be followed by the C.A. The C.A. has made a report after giving full opportunity to both SKG and VKG to submit their documents and other explanations. In such circumstances, merely because the petitioner has to pay some amount and loose certain claims, does not mean that the Award must be set aside.

29. He submits that the Award resolves family disputes and particularly between two brothers. The Arbitrator has been fair and equitable to both. In such circumstances, this court should not interfere with the subject award but dismiss the petition.

30. Mr.Kapadia, submits that with regard to each of the matter raised now there is a complete answer and explanation. He submits that asfaras Sitaram Mills are concerned, the rent is collected by SKG. He has received the amounts. He has taken the benefit of TDS. He submits that Respondent nos.13 to 17 are companies in which SKG and wife are the only directors. All documents and figures are with SKG. He did not produce any documents with regard to the outgoings. Once the onus was on SKG and he did not produce any documents, then, the best judgment Assesment after the report of the C.A. is not liable to be interfered with.

31. Mr.Kapadia has pointed out that there are figures available with regard to the rent received from May 1997 till January 2005 and from January 2005 upto December 2005.

32 He submits that there was a loft admeasuring about 2933 sq.ft. He submits that there are objections raised to the C.A.'s report and those objections insofar as SKG is concerned are that the rent has been

collected all throughout by the companies which are controlled by SKG. He has also invited my attention to the father's award. He has also invited my attention to para 1.7, 1.8, 1.9 and 2.3 of the C.A. report. He has also contended that the contentions now raised are as an afterthought. He has also relied upon a clarification which was sought by filing an application under section 33. He submits that the application made by VKG has been rejected and that of SKG has been partly allowed by correcting the typographical errors. In such circumstances, he submits that the Award cannot be said to be one-sided or partial insofar as the petitioner is concerned. It has been clearly observed by the learned Arbitrator that the claims made by SKG were not specifically substantiated. Yet, opportunity was given to both to inspect the accounts and give clarification to the C.A.'s. It is in such circumstances that the Award has been rendered.

33. As far as Embassy Flat is concerned, Mr.Kapadia urges that there is no mortgage. He submits that 37(i) Form is not available. There is an agreement dated 27.12.1999. He submits that the balance sum is Rs.3.18

crores. He submits that if any amount is paid by SKG to VKG then that amount can be deducted from the total amount. To that extent the share of VKG will get diluted.

34. Insofar as the diamond is concerned, Mr.Kapadia submits that the first respondent is willing to hand over the diamond. Insofar as the valuation of diamond is concerned there is no material on record nor there is any identification. In such circumstances, VKG will abide by the direction in the Award and hand over the diamond.

35. Insofar as the Gurgaon shops are concerned, he submits that the four shops are given to third parties and three are in possession of VKG. He invites my attention to Exhibit 4(a) to the Affidavit-in-reply and para-14 thereof. He has also invited my attention to the agreement in respect of these shops. He submits that two shops are on the ground floor and two shops are on the first floor. He submits that the shops were acquired for Rs.6 lacs and the Arbitrator has awarded Rs.7 lacs. The shops have gone to the share of SKG and

the ownership is that of SKG. He submits that the shops have been handed over to the third parties with a clear understanding in the agreement that the sale is subject to the Award of the Arbitrator and the directions therein. Therefore, the ownership of the shops having been transferred there is complete and equitable distribution insofar as the shops are concerned. He submits that it is now left to the petitioner to take a decision with regard to these shops. The ownership now goes to him. He submits that the possession at site has been fully appraised by SKG inasmuch he had alongwith VKG, gone to Gurgaon and visited the site. Therefore, there is no substance in the grievance now made before the court.

36. Insofar as the Tikri land is concerned, the father did not make any provision for the said land. There are no details about the status of the land. The property is sold by the owner to somebody else. He invites my attention to the declaration at page 120. He also submits that Tikri land is not an asset of the family. He submits that, there is no contradiction insofar as the contents of page 82 and page 108 are

concerned. The Arbitrator is right in not granting any relief in respect of Tikri land.

37. Insofar as the receivables are concerned, VKG has pointed out that full effect has been given to the wishes' of the father. He submits that the directions insofar as the Receivables are concerned, have been issued by the Arbitrator after perusing all the materials. He submits that the items that have been examined by the Arbitrator are value of the Receivables as per the statement given, stock lists and liabilities. He submits that both parties filed their claim in respect of the amounts before the C.A. The C.A. were to hear the parties. The C.A.'s were requested to take accounts for two accounting periods namely September 01, 1996 to May 31, 1997, 1.6.1997 to 30.7.2005. The list of companies which are party to the proceedings were also supplied. The C.A.'s were to make a report on the material produced by either side and after examining the same, the Arbitrator has noted that there is no dispute in respect of the distinction/division of fixed assets. After leaving out innumerable properties SKG and VKG had agreed to

take the Receivables in the proportion mentioned in the Award . He submits that the Arbitrator has in para-24 of the Award clearly observed that all securities debts/shops held against loans to third parties were to be split into 51% and 49%. Both were to make an endeavour to recover the outstanding loans from third parties. The Arbitrator has observed that there is no clear evidence as to whether loans were recovered or otherwise. After observing all this and considering the C.A.'s report the Arbitrator has rightly concluded that there is necessity to give any directions, Insofar as interest is concerned the rate is not uncouscionable and exorbitant. The rate of 2% per month is claimed by both. Therefore, the award insofar as it directs interest to be paid at 24% cannot be said to be contrary to public policy.

38. Mr.Bookwala in rejoinder has raised the issue of bungalow at Shaktinagar which is already referred by me above. There is an answer given by Mr.Kapadia, insofar, as this issue is concerned and that is the bungalow goes to the share of the mother. He submits that both SKG and VKG agreed to the same. Mother has

given this bungalow to the sisters. In such circumstances, this issue cannot be raised. Further, he submits that when companies themselves are divided, then assets and liabilities come with such a division. Receivable is to be divided, liabilities must also go with the same. In such circumstances, it is not proper to now urge that no directions are given with regard to receivables and the Award must therefore be set aside.

39. The final argument of Mr.Bookwala is that the Award is unreasoned and not an executable one. It is contrary to the principles of natural justice. He submits that even if certain benefits are taken thereunder still challenge to the same is maintainable. He has invited my attention to paragraph 78 of the Affidavit-in-reply and submitted that the flats have been sold in 2005. There is no benefit under the Award. He submits that, only trial Balance Sheets have been produced by both sides. He submits that there is a specific objection raised in respect of the rent received but the same has not been considered at all. In this behalf my attention is invited by Mr.Bookwala to page 206. Further, he has also invited by attention

to the fact that once some concession is given by VKG, then, that itself is enough to set aside the Award.

40. I have given anxious consideration to the rival contentions. With the able assistance of the Learned Senior Counsel of both sides, I have perused the Arbitration petition and the Award carefully. Before dealing with the rival contentions, it would be appropriate to note the background in which the differences between the two brothers were referred to by the Sole Arbitrator. The father had written down his wishes with regard to his Estate. It is not as if the father had not provided for the sons. He was aware of the fact that the sons have joined him in business. It was his wish that due to his illhealth he should not leave the matter for further disputes and differences. The reference made on 18.11.2000 nominating the sole Arbitrator sets out all these aspects. It is also apparent that several persons including elders in the family intervened to sort out these differences and disputes. It was not as if the Sole Arbitrator, being a Retired Judge of this court and a Retired Chief Justice of the Karnataka High Court took the matter as

if it is an adjudication before the court. He too at several stages intervened and impressed upon the brothers the aspect of mutually putting an end to their differences and disputes. He has also suggested several modes as is apparent from the reading of the Awards. It is only when the issues could not be resolved amicably that he took up the claims over which the parties had disputes and differences. The Arbitrator has referred to the father's award. The father's Award has been subject matter of some discussion and debate.

41. I have reproduced the same already. The petitioner and the first respondent also referred to it before the learned arbitrator. The Learned Arbitrator has observed that both brothers are not disputing the disbursement made by the award and all that remained was to impeditment the directions in the fathers award.

42 The arbitrator then took up for consideration the claims property wise. The properties are spread over and therefore the Arbitrator took them up seriatim.

43. Insofar as the land at Tikri is concerned, the same is situated near Gurgaon. SKG is claiming the land. However there are some pending proceedings in the court at Delhi. Pendency thereof is not disputed by the parties. Therefore, the learned Judge has not given any directions pertaining thereto. To my mind, the claim of SKG in this behalf being not seriously opposed by VKG, then, this land can go to SKG upon the litigation coming to an end. Till then, the Arbitrator could have directed that the litigation be contested jointly. However, such a Direction being not issued is not fatal. The Award cannot be set aside on the count alone.

44. Insofar as Sitaram Mills godown is concerned, the property was taken on lease and was in the hands of Midday newspaper. The arbitrator observes that the premises were subleased. After the property was subleased the income is Rs.65 lacs. In view of the settlement with the sisters of SKG and VKG so also the mother the lease hold rights are to be divided between SKG and VKG. The possession of the property is now

recovered by the estate. The property was inspected by both brothers and a sketch was drawn of the areas/portion in possession. The brothers have entered into an agreement to divide the property as per the sketch referred to in the impugned Award. The dispute is only about the compensation received and distribution thereof. This and other dispute was referred to the Chartered Accountant. In so far as MidDay lease compensation is concerned, the direction in the Award is that SKG shall pay to VKG a sum of Rs.3,51,31,642/- towards half share in the rent received from Midday. The grievance is that in turn SKG gets only the portion marked on Annexure-9 of the impugned Award. In other words, after parting with a huge amount, the petitioner is deprived of his share in the compensation received and lost a considerable sum.

45. The fathers Award refers to the fact that the estate has interest and right in Sitaram Mills. The father's Award directs that after making five companies dormant, Mangala Homes will be used for handling the estate and assets of MKG. SKG will arrange with Mid Day to have the necessary changes made in the agreement

and transfer to Mangala Homes the deposit of Rs.65 lacs, the rights and the full income of all license fees, rents, income will be solely to MPG/Mangala Homes. The Award now stipulates that the area which is surrendered by M/s.Midday will be divided as per Annexure-9, both brothers will get half portion as earmarked on the plan and they will have to put a boundary wall at theirs costs, charges and expenses. The dispute appears to be as to how the Arbitrator arrived at a sum of Rs.3,51,1,642/- which is directed to be paid by SKG to VKG. Insofar as, that aspect is concerned, the Learned Sole Arbitrator relies upon Schedule-III of the C.A.'s report and the figures are derived therefrom. In para-35 of the Award, the Learned sole Arbitrator holds that the rent received was to the tune of Rs.6,64,63,285/- and the TDS certificate is of Rs.38 lacs. Thus, the amount received from Mid-Day is Rs.7,02,65,285/- out of which VKG would be entitled to half the amount. In this behalf, the grievance of Mr.Bookwala is that Sitaram Mills was not in control of SKG exclusively. He has relied upon the grounds in the petition and more particularly grounds (f), (J), (O) and (P). The sum

and substance of the grievance projected therein is that the agreement with M/s.MidDay does not show that the petitioner (SKG) was to get licence fees/rent, yet, the Chartered Accountant's proceeded as if the amounts were received by SKG personally. Before the C.A.'s, SKG stated that sum of Rs.6,34,12,515/- has been the rent received from 1.6.1997 to 31.7.2004. The C.A. took a larger sum. There was no basis for these figures. It is pointed out that a sum of Rs.7,18,000/- per month was claimed to be the rent receivable from Mid-Day publications. This was the figure in the original statement of claim. However, before the C.A. a much larger figure is stated and claimed.

46. The grievance is that the Chartered Accountants failed to appreciate that Mid-day Publication had not paid rent as per the original agreement and the escalation clause therein. Further more, TDS rate was assumed @ 20% as if that was the tax to be paid. The Chartered Accountants however failed to consider that as per the agreements, the rents were received by Respondent nos.13 to 17 who were corporate entities, which paid income-tax @ approx.40% during the relevant

period. Thus, in any view, the net amount received by Respondent Nos.13 to 17 was significantly lower. The Chartered Accountants and the sole Arbitrator have not only failed to consider the aforesaid facts, but have also failed to appreciate that large expense were incurred by Respondent Nos.13 to 17 towards payment of outgoings, rents, maintenance and repairs, legal expenses (to defend injunction notices appeal and suit filed by the superior land lord, Saidpur Jute Co.Ltd), salaries etc. which was clear from the figures of net profits submitted to them by the petitioner. The net profit was significantly low when compared to the rent received by the said companies. The net divisible amount if at all, between the petitioner and Respondent no.1 was thus significantly lower then the aggregate rent received from Mid-day Publications.

47. Thus, the grievance is that all sums which are directed to be paid under these heads are all assumed figures which are supplied by the first respondent and accepted straight away. The C.A.'s have noted this aspect that is how the Arbitrator has commented that SKG was not fully co-operating and did not give

specific details but made some general claims and submissions before them. The C.A.'S have proceeded on whatever material was made available by both VKG and SKG. Schedule III Part B of the report sets out the amounts received by SKG. The first amount is of rent in the above sum. The amount was received by SKG on the basis of rent calculated as per the agreement with Mid-day. The C.A.'s have verified the period and amount payable with reference to the copy of the agreement and the TDS deducted at the assumed rate of 20%.

48. In my view, it will not be possible for me to go into such minute details as if the present proceedings are an appeal against the Award. The figures have some basis. It is not as if the sole Arbitrator has arbitrarily fixed the quantum or sum payable by SKG. There was basis for the same in the form of the report of the C.A.'s who have been appointed with consent of the parties. Parties themselves agreed to go before the C/.A.'s and produce the documents in support of their claims. Whatever material was produced by them has been referred and

relied upon. In the instant case it is not the argument of Mr.Bookwala that the agreement with Mid-day has not been referred to. In such circumstances, merely because the Award directs some payment by SKG under this head does not mean that it is liable to be interfered with.

49. In this behalf, the reply-affidavit which is filed has also referred to in detail to the proceedings before the Arbitrator and these Chartered Accountants. VKG states that the rents received were as per the agreement with Mid-day. The agreement was between Mid-day and Respondent Nos.13 to 17. These Companies are admittedly under the control of the petitioner and he has access to their Accounts and Documents. If the calculation was incorrect then the correct statement of rentals received by SKG from Respondent no.13 to 17 would have been placed as contemporaneous evidence. That is admittedly not done. Once the property also goes to the share of SKG, then, it is not as if the Award is one-sided, or fails to take into consideration the rival cases or that the Award is something which has absolutely no basis.

50. In so far as the Embassy Flat is concerned, the argument is that the Learned Arbitrator awarded 50% of the total sale proceeds regarding this flat to VKG. The amount as awarded (Rs.1,82,50,000/-) is excess than what is claimed by VKG and the Arbitrator has granted to VKG. The Learned Arbitrator lost sight of the fact that there was an account submitted on 4.8.2005 by VKG to the Chartered Accountants, copy of which was tendered by SKG which shows deposit of Rs.1,14,96,500/- by SKG. This amount was reduced to Rs.1,13,25,100/- by M/s.Harbhakti & Co. (Chartered Accountants). Thus, it is incorrect to state that SKG has not proved that monies were deposited with him by Vijaya Bank for repayment of loan in respect of Embassy Flat. All figures are admitted by VKG. Further, the Learned Arbitrator was fully aware that all surplus funds from sale of the flat have been attached by the Income-Tax department from the bank in which the funds were deposited towards liabilities of the father. The Bank has filed a Reference in this court and the funds are deposited through court in various banks subject to the decision in the Income-Tax Reference. VKG is party to

these proceedings and all this was within the knowledge of the Learned Arbitrator. A copy of the proceedings was also handed in. Yet, the amount is directed to be paid to VKG.

51. Mr.Kapadia, has pointed out that there is no substance in the contention that the sale value was assumed inasmuch as, the petitioners suppressed all details, particulars of accounts. The only available document was the 37-I Form filed by the petitioner as per the Income-Tax Act and the no-objection certificate granted by the Income-Tax authority. The sale value was determined on the basis of the No-objection certification. My attention is invited to the letter of the Chartered Accountants dated 10.9.2005. Further, insofar as the Bank loan is concerned, Mr.Kapadia submits that SKG did not disclose any particulars, or evidence or documents to substantiate any repayment of bank loan from the sale proceeds. The C.A.'s report on which the petitioners rely, only records that a sum of Rs.1,13,21,500/- was deposited in the joint bank account-Vijaya Bank which was recovered towards rent from Mid-day. The admission cannot be construed as

meaning repayment of outstanding loan. Mr.Kapadia, submits that, the loan was repaid from other sources and not from the sale consideration. He submits that even with regard to the balance sale consideration allegedly attached by the Income-tax authorities no claim was raised before the Larned Arbitrator. No ground is raised in the petition and no attachment order is produced.

52. I find substance in the contention of Mr.Kapadia. The petitioner is now raising some or the other grievance to delay the payment as awarded. It is not as if the claim was not known to the petitioner. The petitioner was given opportunity by the arbitrator of going before the Chartered Accountants and producing documents. The petitioner was also given opportunity by the Learned Arbitrator himself. Nothing prevented the petitioner from producing documents to show that the sum received as consideration from the sale of the flat has been appropriated or adjusted and infact not received as contended. These are not matters over which the court can sit in judgment. There is substance in the contention that the necessary

documents, to correlate the repayment of the loan, assuming there is repayment and balance consideration being attached by the Income-Tax Authorities, were required to be produced by SKG as this case was put forward by SKG. If SKG is unable to produce the documents, then, the Arbitrator taking the figures from the C.A.'s report cannot be said to be something which is beyond the scope of the reference or contrary to the principles of fairness, equity and justice.

53. Rs.7,18,00,000/- per month from March, 1997 onwards alongwith interest is the rent which is computed from the date of Leave and License Agreement and based on it the figure is arrived at. Thus, the Award insofar as Sitaram Mills and Embassy Flat is concerned, does not contain any assumed figures. They are taken from the C.A.'s Report which in turn is based upon Documents. Hence, the Award cannot be set aside on this ground.

54. The next contention was with regard to the Diamond. The argument is that the petitioner was entitled to the Diamond and if VKG is unable to hand

over the diamond, then, Rs.35 lacs to be paid as the value thereof. The argument proceeded on the basis that the value of the diamond is not Rs.35 lacs but much more and in the vicinity of Rs.1 crore.

55. Here, I have noted the argument that the diamond is available and VKG is ready and willing to return the diamond. When the diamond itself is available, then, the issue of its valuation is not relevant. I accept the statement of Mr.Kapadia that the diamond would be returned to VKG, the petitioner. In so far as Gurgaon shops are concerned, it is held that the petitioner is entitled to the shops and VKG is liable to pay Rs.7 lacs to the petitioner which was received under an Agreement for sale in respect of these shops. It is alleged that the Award does not state the time within which the possession of the shop is to be handed over since the shop is in the possession of third parties. Here again, the argument is that the value of the shops is much more and going by the current market value is Rs.60 lacs.

56. Mr.Kapadia, submits that there are seven shops.

Four shops have been illegally encroached by the adjoining shop owners by demolishing the separating wall. No documents of title is available with the family. In such circumstances, the decision in the best interest of the family and commercial yardstick was taken. The agreement was entered into on 30.11.2001. The agreement discloses clearly that the proposed sale is subject to the arbitral proceedings and the Award. Thus, depending upon the Award, the shops need to be repossessed. Mr.Kapadia, complaints and in my opinion rightly that no evidence has been led by SKG or any material produced to substantiate the value of the shops. No application was made requesting that the valuation be done. Infact all seven shops have not been alienated as SKG's counter claims are clear. He admits that the agreement is in respect of only four out of seven shops. The petitioner was therefore given the title to the shops and Rs.7 lac. Naturally, no time could have been set by the Arbitrator for handing over the shops because steps in that behalf will have to be taken by SKG. Now, certain steps are required to be taken by SKG, does not mean that the Award is one-sided or that the direction of

the Arbitrator is contrary to the terms of the reference or against public policy.

57. Three shops go to the petitioner straightaway and for four shops he may have to take necessary steps in law. It is not denied before me that some shops are going to go straight away to the share of SKG.

58. Insofar as Tikri land is concerned, once again the petitioner has not produced any document to support his valuation. The title to the land is disputed. It is not necessary to give any direction but both brothers must try to retrieve the property is the finding of the Arbitrator. Once nothing was produced before the Arbitrator to conclusively establish that Tikri land is an asset of the family, then, the Award cannot be faulted.

59. Insofar as the receivables are concerned, the Award of the father directs that the receivable have to be apportioned on the basis of 51% to 49%. The argument is that the Arbitrator did not give any direction although the amounts are receivable of the

companies which have gone to respondent no.1.

60. Mr.Kapadia, submits that the Award does not state that the loans were received by an particular company. Once again the petitioner has not produced any documentary evidence to show as to which companies are entitled to such receivables. Mr.Bookwala, has relied upon the working which was according to him, always before the Arbitrator. He states that there are names of companies in which the amounts have been invested together with rate of interest. SKG's share in that will come to Rs.12.82 crores. He submits that all loans and receivables were allotted to VKG and under his control. Since companies have gone to VKG the rights and liabilities would come alongwith it is the complaint of VKG. However, when the Award of the father is accepted by both sides and the receivable is to be apportioned as above, then, the Chartered Account and Arbitrator were duty bound to provide for sums to be paid to SKG after apportionment. That is something which is neither done by the C.A. or by the learned Arbitrator. Mr.Kapadia, controverts this submission and points out that the respondent no.1 offered

inspection of accounts on a reciprocal basis. SKG did not give inspection of his accounts. He invited my attention to the fact that before the learned Arbitrator it was admitted that these receivables were cash loans. In such circumstances, when SKG did not co-operate but respondent no.1/VKG admitted the receipt of valuables to the extent of Rs.2,19,17,996/-, then, that figure was taken into account.

61. Once again I find no substance in the arguments of SKG on this aspect. In a manner SKG wants me to undertake an exercise once again which the arbitrator and the C.A. had undertaken. If there are no documents produced by SKG either before the C.A. or before the arbitrator and all that is relied upon is some objections raised in writing by SKG to the C.A.'s report, then, in the absence of anything more, it is not possible to hold that the Award is bad in law. The Learned Arbitrator has gone by the fact that the loans have been given by the family and the interest charged. It is for both SKG and VKG to make an endeavour to recover the outstanding loans from third parties. The Arbitrator's directions facilitates recovery of loan

but when he does not have before him the exact data of the loans and interest so also their recovery then what directions the Arbitrator could have given is not clear to me at all.

62. In one meeting SKG stated 51% share mentioned by him in the claim dated 11.7.2005 is not final and he is entitled to get more. So brothers have taken a stand that this is beyond our purview and the same be addressed by the learned Arbitrator. Thus on each and every aspect whether it be the claim arising out of the Sitaram Mills Rent or Embassy Flat or Diamond, the arbitrator has referred to each and every letter, statement which has been forwarded by the parties before him and has given his comment. The brothers have also pointed out the documents that have been produced. They have also been referred to. It is not possible for me to sit in appeal over the conclusions which are based on the facts as stated. Therefore, the Annexure-4 which has been annexed to the report of the C.A. has been accepted and since SKG was unable to substantiate the claim as made would go to show that the conclusion of the arbitrator is not erroneous,

then, the Award cannot be interfered with.

63. The last aspect pertains to the ShaktiNagar property. This claim was made during the course of rejoinder arguments by Mr.Bookwala. The argument is thus :-

". The Shaktinagar property and Sitaram Mills property were the two major properties of the family both admeasuring about 8500 sq.ft. Shaktinagar property is a large residential bungalow at Delhi, whereas Sitaram Mills property is a godown at Mumbai. The Shaktinagar property has been under full control of VKG who has been commercially exploiting the same since 1997 and till this date Sitaram Mills property was licensed by Respondent Nos.13 to 17 which were controlled by SKG at mother's request. Both the above properties were originally part of the MPG estate [see page 195 of main petition]. Both the properties came to the share of mother as per clarification Award dated 9th April, 1999

(see page 24 Part I). While SKG has been directed to share 50% of income from Sitaram Mills property no such directions has been passed against VKG to share the income from Shaktinagar property with SKG, although SKG raised the claim before M/s.Haribhakti & Co., (see page 163 part I). Claim in respect of Income from Shaktinagar property was also raised by SKG before the Arbitrator at page 210- part II. While the Award is absolutely silent on this claim of SKG there is absolutely no mention by the Arbitrator to this claim of SKG. Therefore SKG raised this issue under Section 33 Application (see page 314 Volume II), wherein he requested the Arbitrator to consider his claim. However, the Learned Arbitrator has in turn rejected this claim on the ground that this claim cannot be the subject matter of section 33 Application. The Learned Arbitrator further says that the bungalow at Shaktinagar has gone to them other and in the declarations filed by both SKG and VKG, the right to recover the rent was not

reserved. It is submitted that the property at Sitaram Mills had also gone to mother under Clarification Award. It is only on the basis of Declaration dated 26th March, 2004 signed by mother and accepted by SKG, VKG & sister that VKG is asking for 50% of the rights in the property. As per the Declaration VKG has not reserved any right to recover past rents but yet VKG has been awarded 50% of the rent recovered by Respondent Nos.13 to 17. In his affidavit in reply in para No.58 at page No.250, Respondent no.1 has wrongly contended that petitioner did not lead any evidence in support of his claim, whereas in fact the petitioner had relied upon documentary evidence to show that Respondent no. was commercially exploiting the property. (see pages 217 to 221 of Part II). SKG's claim was bogus and SKG was not entitled to claim his share of 50% rent in Shaktinagar property, at the rate of 4 lacs per month, atleast some finding ought to have been given by the Learned Arbitrator. However, the Award is totally silent on this aspect. In

section 33 application SKG's claim was wrongly turned down. "

64. The said arguments are replied by VKG as under :-

." The parties had admittedly signed a 'Declaration' on 2/8/05, un-conditionally agreeing that this property would go exclusively to Respondent no.5. (Please see Part I page.386). The Interim Award (Pg 127) records that by consent of all parties the said property is un-conditionally allotted to Respondent no.5. This is also recorded in the Award (page 72). The Award also records [pg 112-(K)] that Respondent no.5 had agreed to give possession of this property to Shiksha (Respondent no.11). Respondent no.5 and/or 11 have made no such claim to rent etc. Admittedly the petitioner has not produced any evidence of any rent actually received. The C.A.'s report (pg 164-Sr.No.8) records that the rent if any was a 'cash transaction' and

could not be verified. The Award considered the C.A.'s report in detail. (pg 99 to 103). In fact, Respondent no.1 had filed a claim (pg 337) recording that the rent income from the said property was Rs.7,63,500/- and expenses incurred from the said property were Rs.18,11,141/- and claimed the difference from the petitioner, which claim was also disallowed, since the C.A. reported that the rent income was a cash transaction and could not be verified (pg 164 Sr No.8) and that no vouchers were furnished to prove the expenses claimed (Pg 174 Sr.13). The Learned Arbitrator's Order U/s 33 correctly holds that since the property has been exclusively allotted to Shantidevi as per consent terms, the petitioner has no right or interest therein and has reserved no rights to claim mesne profits, therefore in any event his claim cannot be entertained (pg 215). No question arises of the Learned Arbitrator applying the same method as applied for the Sitaram Mills property, since the Sitaram

Mills property was divided between the petitioner and respondent no.1 themselves, whereas the said Shaktinagar property is allotted to Respondent Nos.5/11 as aforesaid."

65. Once, on agreement between parties, this property is given to the mother, then, there is no substance in the contention with regard to Shakti Nagar property.

66. Finally, what remains is the objection that the award is unreasoned, not executable and contrary to the principles of natural justice. While arguing on this issue, Mr.Bookwalla, could not dispute that the petitioner has derived some benefits under the impugned award. It is not as if the award as a whole is impugned. The award is impugned only qua certain properties and certain directions. If the award is bad because it is unreasoned or contrary the principles of fairness, equity and justice and, therefore, public policy, then, I fail to understand as to how it can be said to be good, qua the other properties and the

directions. Instead the argument is the award may be bad in part but since the 1996 Act does not permit any segregation or separation, the whole award must go and set aside. In a family dispute, which was going on from the time father was alive and apprehending that, he has made his wishes clear in writing, but his writing also could not resolve the issue, then, it would be unfair now to unsettle the decision, which gives effect to the Father's Award. The award not only decides the claims of two brothers but the mother and sisters as well. The mother has been given some properties and rights by consent of both brothers. Further, the sisters also have been given some benefit from the estate. This cannot be unsettled, more so, when I find that the only reason put forward is that the petitioner's objections have been overlooked by the Arbitrator.

67. Now, some of the objections raised to the C.A. report may not have been referred to by the learned Arbitrator. However, he has referred to the oral submissions and other materials. The petitioner could not substantiate his claim, is apparent from my above

conclusions. His objections were vague on number of occasions. He also was obliged to produce some documents which he has not. That apart, both brothers do not dispute and rather do not want to go contrary to the wishes of father. Therefore, there is substance in the contention of Mr.Kapadia that a prolonged dispute has been resolved by the Arbitrator in the best possible manner. Merely because, one could have written a more elaborate and detailed award by referring to the statements of witnesses and contents of documents, is no ground to set aside the award which resolves the family dispute. As the learned Arbitrator now wishes that the brothers must get along with their lives independently and at this belated stage atleast, try and fulfill wishes of their late father, then, such an Award should be accepted by them. The Arbitrator is also chosen by consent of them.

68. When it comes to settlement of family disputes, a little flexible approach is permitted. The Arbitrator can evolve some procedure which is in consonance with fairness and when not disputed by both sides must not be interfered with. (See Paras 31 and

32 of the Decision of the Hon'ble Supreme court reported in (1994) 6 SCC 485 State of Rajasthan V/s. Puri Construction Co.Ltd & Anr). A little freedom in an anxiety to resolve the disputes amicably or finally should be permitted in such matters. The Supreme Court in this context observes in the Decision referred above thus:-

". The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of

the Act.

What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. "

. (2006) 11 SCC 181 Mcdermott International Inc.
V/s. Burn Standard Co.Ltd and Ors.

69. Having held that the Arbitral award suffers from no infirmity, much less the ones pointed out by section 34, no other conclusion is possible. Petition, therefore, deserves to be dismissed and is accordingly dismissed. However, in the facts of the case, there shall be no costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 455 OF 2006

ARBITRATION PETITION NO. 93 OF 2007

ARBITRATION PETITION NO. 311 OF 2007

SushilKumar Gupta	Petitioner.
Versus	
VinodKumar Gupta & Ors.	Respondents.
Mr.Bookwala for the petitioner.	

Mr.Kapadia for respondent no.1.

CORAM: S.C.DHARMADHIKARI, J.
DATED: 20th December, 2007.

1. In the light of the above ad-interim order, petitions under Section 9 do not survive and are disposed off accordingly. At this stage, learned advocate appearing for the petitioners seeks continuation of the ad-interim order to enable the petitioners to challenge this judgment further. In the light of the ensuing vacation and order having been delivered today, it is directed that the ad-interim order shall continue for a period of six weeks from today.

sd/-
